STATE OF MICHIGAN

COURT OF APPEALS

GEORGE M. STAPLETON,

Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 24, 2007

No. 273392
Manistee Circuit Court
LC No. 03-011337-NF

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this insurance coverage dispute, defendant appeals as of right, challenging the trial court's order awarding plaintiff attorney fees under MCL 500.3148(1) and case-evaluation sanctions under MCR 2.403(O). Defendant also challenges the trial court's order granting summary disposition in favor of plaintiff under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

This case arises out of a single vehicle accident that occurred on November 9, 2002, when plaintiff drove his former fiancée's car over a manhole. Plaintiff's former fiancée obtained insurance coverage for the vehicle from defendant just a few days before the accident, and she named plaintiff as the principal driver on the policy. Plaintiff alleged that he sustained back injuries in the auto accident, and he requested that defendant pay him no-fault benefits under the policy. However, defendant denied plaintiff's claim for benefits, asserting that plaintiff's injuries did not arise out of use of the vehicle, that he failed to file sufficient proof of his loss, and that he intentionally concealed and misrepresented material facts about his medical history. Plaintiff then filed suit.

On April 27, 2005, plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that no material fact existed that defendant was obligated to pay no-fault benefits under MCL 500.3107. The trial court denied plaintiff's motion, and the matter was referred to facilitative mediation, which resulted in a partial settlement. Plaintiff then filed a renewed motion for summary disposition, which the trial court granted. Further, the trial court awarded plaintiff $72,666.67 in attorney fees under MCL 500.3148(1), and $50,314.54 in case-evaluation sanctions under MCR 2.403(O). Defendant now appeals.

II. SUMMARY DISPOSITION

A. Standard of Review

We note that this Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the nonmoving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31. Further, the interpretation of a court rule is a question of law that this Court reviews de novo. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 28; 666 NW2d 310 (2003).

B. Analysis

Defendant first argues that the trial court's denial of plaintiff's allegations entitled it to a jury trial because plaintiff had the burden of proving that the accident occurred as he claimed and that the accident caused his injuries, and a jury was free to disbelieve plaintiff's testimony. We disagree.

At the outset, we disagree with plaintiff's argument that this issue is not preserved. Defendant sufficiently raised this issue at the hearing on plaintiff's renewed motion for summary disposition and defendant was not required to take exception to the trial court's decision in order to preserve the issue for appellate review. MCR 2.517(A)(7); *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 554; 672 NW2d 513 (2003).[1]

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[1] We also find meritless plaintiff's argument that defendant either abandoned or failed to preserve its arguments on appeal by failing to file the August 21, 2006, hearing transcript on plaintiff's motion for entry of final judgment, including attorney fees and case evaluation sanctions. Plaintiff erroneously relies on MCR 7.210(F), which is inapplicable to this appeal because it is being considered pursuant to Administrative Order No. 2004-5, governing appeals of summary disposition decisions. Under AO 2004-5, an appellant is required to order only the transcript of the hearing on the motion for summary disposition.

MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her*. [Emphasis added.]

Defendant argues that the italicized portion of this rule holds true only if the nonmoving party has the burden of proof at trial. Defendant relies on case law such as *Ghaffari v Turner Constr Co* (*On Remand*), 268 Mich App 460, 463; 708 NW2d 448 (2005), which states that "when the nonmoving party would have the burden of proof at trial, the nonmoving party must establish that a genuine issue of material fact exists by admissible documentary evidence." Defendant contends that the converse of this principle must necessarily be true, i.e., that if the moving party would have the burden of proof at trial, then the nonmoving party *may* rely on mere denials to defeat the motion for summary disposition.

Defendant has identified no authority directly supporting its asserted proposition, but rather, cites case law holding that a jury is free to disbelieve testimony even if it is uncontradicted. Although it is true that a jury is free to disbelieve uncontradicted testimony, this principle does not supplant the requirement under MCR 2.116(G)(4) that a party opposing a motion for summary disposition under subrule (C)(10) must produce some evidence showing that there exists a genuine issue of material fact for trial. To hold otherwise would amount to judicially construing MCR 2.116(G)(4) contrary to its plain language. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). When the language of a court rule is plain and unambiguous, this Court must enforce the meaning plainly expressed and judicial construction or interpretation is not permitted. *Id.* This Court simply may not permissibly construe MCR 2.116(G)(4) as allowing a nonmoving party to rest on mere denials alone in opposing a motion for summary disposition under subrule (C)(10). *Id.* Accordingly, defendant's argument is unavailing and its mere disbelief of plaintiff's version of events did not entitle it to a jury trial on the basis that a jury could have disbelieved plaintiff's testimony.

Next, defendant argues that a genuine issue of material fact existed regarding whether plaintiff made false statements with the intent to conceal a material fact contrary to the no-fault policy. Defendant raised this issue in the trial court, but the court did not address it and denied plaintiff's motion for summary disposition on other grounds at that time. Although an issue raised but not addressed and decided in the trial court is generally not preserved for appellate review, where the lower court record provides the necessary facts, appellate consideration of such an issue is not precluded. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). Here, the record contains the necessary facts, so we exercise our discretion to address the issue. See *id.* at 444.

The parties do not dispute that the no-fault policy at issue contains the following provision:

> There is no coverage under this policy if you or any other person insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

Defendant argues that plaintiff violated this provision when he lied about his preexisting back condition in his recorded statement and examination under oath ("EUO"). In his recorded statement, plaintiff averred that he never had any prior back injuries or problems. In addition, in his EUO, plaintiff stated that he never sought medical treatment for back pain and that he began receiving chiropractic adjustments from Dr. Bradley Powers when he started boxing at a much younger age. Plaintiff stated that the chiropractic adjustments were only for his upper back and that he had no problems with his lower back.

Dr. Powers's deposition testimony belies plaintiff's assertions. Dr. Powers testified that plaintiff began treating with him on March 30, 1992, because of lower back pain. Thereafter, Dr. Powers treated plaintiff for lower back pain on several occasions over the course of approximately ten years. When asked about his treatment with Dr. Powers, however, plaintiff responded as follows:

> *Q*. All right. And what would you see Mr. Powers – Dr. Powers for?
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> *A*. Just for an adjustment, like, you know, when you – you know, you get – your bones get – all your muscles get all jammed up in your back from working your punches and stuff. Everything gets crunched up in there, and snap your neck and, you know, and back and stuff and so – so, you know, it would be aligned – a back adjustment, more or less.
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> *Q*. Over the years would you see Dr. Powers like once a year or twice a year?
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> *A*. Once a year, maybe.
>
> *Q*. All right. And was it usually for your back?
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> *A*. My upper back, yeah.
>
> *Q*. Would he ever work on your lower back?
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> *A*. He didn't have to. I had no problems. It was always between my shoulder blades.

In fact, Dr. Powers testified that the only time that he treated plaintiff for pain between his shoulder blades was on January 3, 2001, and that all of plaintiff's remaining visits were because of lower back pain. Accordingly, we conclude that reasonable minds could differ regarding whether plaintiff made false statements with the intent to conceal or misrepresent a material fact in connection with his claim for no-fault benefits. Thus, a genuine issue of material fact existed for trial on this issue. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We therefore reverse in part the trial court's summary disposition ruling in favor of plaintiff and remand this case for further proceedings with respect to this issue.

III. ATTORNEY FEES & SANCTIONS

In light of our decision, we also reverse the trial court's award of no-fault attorney fees under MCL 500.3148(1) because there existed a bona fide factual dispute regarding plaintiff's entitlement to benefits. We further vacate the trial court's award of case-evaluation sanctions under MCR 2.403(O).

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Peter D. O'Connell